

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY COONS,

Plaintiff,

v.

A. GOSAI, et al.,

Defendants.

No. 2:20-cv-0929 KJM KJN P

ORDER

Plaintiff is a state prisoner, proceeding pro se. On July 20, 2020, plaintiff filed a document styled, "Motion for Summary Judgment." (ECF No. 21.) Plaintiff claims that appeal No. MCSP-B-19-05035 has been exhausted, and then states that on November 7, 2019, defendants violated plaintiff's Eighth Amendment rights, and he has ten witnesses willing to so testify. (ECF No. 21.)

Plaintiff's motion is defective for several reasons. First, to the extent plaintiff is attempting to demonstrate he has exhausted administrative remedies, plaintiff is advised that failure to exhaust is "an affirmative defense the defendant must plead and prove." Jones v. Bock, 549 U.S. 199, 204, 216 (2007). In other words, plaintiff does not have to address the issue of administrative exhaustion unless defendants file a motion raising the issue.

Second, plaintiff's motion is premature. Although defendants have signed waivers of service of process, no defendant has yet filed an answer or otherwise appeared.


1 Third, no discovery and scheduling order has yet issued. The scheduling order will set a
2 schedule for the filing of dispositive motions once discovery is completed.

3 Fourth, plaintiff's motion is substantively defective. Although plaintiff wrote
4 "Declaration of Timothy Coons Jr." above his motion, the motion is not signed under penalty of
5 perjury and therefore does not constitute a declaration. Plaintiff is advised that when the court
6 issues the discovery and scheduling order, plaintiff will be provided information on how to
7 properly file or oppose a motion for summary judgment.

8 For all of the above reasons, plaintiff's defective motion is denied without prejudice.

9 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion (ECF No. 21) is denied
10 without prejudice.

11 Dated: July 29, 2020

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13 KENDALL J. NEWMAN
14 UNITED STATES MAGISTRATE JUDGE

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